

**OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD**

QUARTERLY CASE SUMMARIES

July 2001 - September 2001 (3rd Quarter)

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

What Constitutes Written Notification under §681.104(1)(a), F.S.

Castillo v. General Motors Corporation, Chevrolet Motor Division, 2001-0753/ORL (Fla. NMVAB September 26, 2001).

The Manufacturer argued that a letter sent by the Consumer describing the complaints with the vehicle was not written notification as required under the Lemon Law, but was treated as a “normal customer complaint” to which it did not respond. The Consumer subsequently sent the Motor Vehicle Defect Notification form, but declined to take the vehicle in for repairs after the Manufacturer responded. The Manufacturer asserted that this constituted a denial of its right to a final repair attempt. The Board concluded that the letter constituted notification because the Lemon Law does not require consumers to use the form located in the back of the Lemon Law booklet, but only requires written notification. Since the Manufacturer failed to respond to the Consumer’s letter, the requirement that the Manufacturer be provided a final repair attempt did not apply. Because the statute does not specifically define how many attempts are reasonable, the facts and circumstances associated with the repair history of the Consumer’s vehicle established that the Manufacturer was afforded a reasonable number of attempts, but failed to correct the nonconformity; thus the Consumer was awarded a refund.

What Constitutes an “Out-of-Service Day,” Rule 2-30.001(2)(c), F.A.C.

Gillstrap v. Ford Motor Company, 2001-0721/TPA (Fla. NMVAB September 21, 2001).

In this case, the Consumer’s vehicle was towed to a Goodyear dealer on September 5, 2000, at the direction of the Consumer following an accident, because the brakes failed to stop the vehicle, and Goodyear had recently replaced the front brake pads. Subsequently, the vehicle was towed by the Consumer’s insurance company to an independent engineer for analysis, where it remained until March 15, 2001, when it was transferred to the Manufacturer’s authorized service agent; thereafter, a master cylinder repair was completed on March 16, 2001. The Consumer wanted the Board to count the days between September 5, 2000, and March 16, 2001, as out-of-service days. The Manufacturer argued that the days the vehicle was in the custody of the Consumer’s insurance company were not “days out of service” as defined in Rule 2-30.001(2)(c), Florida Administrative Code. Based on these facts, and the rule definition, the Board agreed with the Manufacturer’s argument, and did not count the

days prior to March 15, 2001, as out-of-service days.

NONCONFORMITY §681.102(16), F.S.

Morrison v. Ford Motor Company, 2001-0624/ORL (Fla. NMVAB August 27, 2001).

The Consumer complained that a gas fume odor intruded into the cabin of the vehicle when the vehicle was first driven after fueling. According to the Consumer this odor intruded approximately 90 percent of the time, causing sickness and headaches. The Manufacturer argued that this alleged problem did not substantially impair the use, value or safety of the vehicle, because its authorized service agent could not duplicate the problem, did not observe any fuel leaks, and the vehicle's on-board computer did not contain any stored fault code evidencing a fuel problem. During the hearing, a test drive was conducted wherein the vehicle was driven approximately three miles to a gas station to obtain fuel. During the short trip back to the hearing site, one Board member developed a headache from the gas fume odor. The vehicle's engine was turned off and restarted. The odor was not present when the vehicle was restarted. The Board concluded that this odor constituted a defect or condition that substantially impaired the use and value of the vehicle, and declared the vehicle a Lemon.

Spina v. American Suzuki Motor Corporation, 2001-0531/ORL (Fla. NMVAB July 24, 2001).

The Consumers complained of a foul odor that was described as a urine or mold odor emanating from the air conditioner vents, which caused the Consumers to experience headaches and sore throats. The Manufacturer contended that this odor did not substantially impair the use, value or safety of the motor vehicle. The Board test drove the vehicle during the hearing and experienced an offensive, intolerable odor emanating from the air conditioner vents; consequently, the Board rejected the Manufacturer's argument as not supported by the evidence. The vehicle was deemed a Lemon and a refund was awarded.

Ferrell v. General Motors Corporation, Cadillac Motor Car Division, 2001-0575/TPA (Fla. NMVAB July 30, 2001).

The Consumer complained of a transmission jerk or jolt upon acceleration after deceleration, which was not experienced until the vehicle attained approximately 9,000 miles of operation. The Manufacturer asserted the affirmative defense that the problem did not constitute a substantial impairment to the use, value or safety of the vehicle, because it was induced by the manner in which the Consumer drove the vehicle. During the hearing, the Board conducted a test drive of the vehicle and experienced a thud or jolt upon acceleration after deceleration. The Consumer did not drive the vehicle during the test drive. The Board rejected the Manufacturer's defense and declared the vehicle a Lemon.

Lee v. General Motors Corporation, Pontiac-GMC Division, 2001-0702/PEN (Fla. NMVAB September 17, 2001).

The Consumer complained of an intermittent "violent" shaking in the cab of his pickup truck. The Manufacturer asserted that this did not constitute a substantial impairment to the use, value or safety of

the vehicle, because, after each time the vehicle was test driven when presented for repair, the Manufacturer's authorized service agent was unable to verify or duplicate the Consumer's concern. The Board rejected this assertion, deemed the vehicle a Lemon, and awarded the Consumer a refund.

Rule 2-30.001(2)(a), F.A.C., Definition of "Condition"

Freiman v. BMW of North America, LLC., 2001-0734/ORL (Fla. NMVAB September 25, 2001). At the hearing, the Manufacturer asserted that the complained of water leak constituted two different defects—a driver's window leak that was cured within a reasonable number of repair attempts, and a passenger door leak, which resulted in soaked carpet, that was only subjected to one repair attempt prior to the Manufacturer's receipt of written notice. The Manufacturer asserted it was not afforded a reasonable opportunity to repair the "door leak" problem. The Board rejected this assertion, and concluded that the "water intrusion" problem was a "condition," defined in Rule 2-30.001(2)(a), Florida Administrative Code as a "general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part." The Board further concluded that the water intrusion condition substantially impaired the use and value of the vehicle, and that this nonconformity was not corrected after a reasonable number of attempts. The vehicle was declared a Lemon and the Consumers were awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Bennett v. DaimlerChrysler Motors Corporation, 2001-0546/TLH (Fla. NMVAB July 30, 2001). The Consumer complained of an "excessive" whining noise in the differential, which was most prevalent at speeds between 55-70 miles per hour. During the hearing, the Consumer testified that this noise gets "very obnoxious" each time the vehicle's odometer turns over 5,000 miles. He told the Board that the noise was "obnoxious" on the date of the hearing. The Manufacturer contended that this type of noise was "normal factory noise that is evident in all vehicles," thus it did not substantially impair the use, value or safety of the motor vehicle. The Board test drove the vehicle during the hearing, and a low or normal whining differential noise, especially at deceleration, was experienced. The Board concluded that this noise did not constitute a nonconformity and dismissed the case.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

McKenzie v. Ford Motor Company, 2001-0455/STP (Fla. NMVAB July 5, 2001). At the hearing, Counsel for the Manufacturer argued that the Board "lacked jurisdiction" to consider the Consumer's complaint of a ball joint stud fracture, because the Board would have to determine whether an accident caused the fracture, or the fracture caused the accident and the Board had no such authority. Alternatively, Counsel argued that the fracture was the result of the accident, relying on an

accident report which stated that there was no vehicle defect that contributed to the accident, the Consumer's testimony that the vehicle exhibited no handling problems prior to the accident, and the alleged performance of a ball joint recall approximately two months prior to the accident. The Manufacturer did not present any witness testimony during the hearing. The Consumer testified that his vehicle struck a guard rail on an interstate highway when he lost control of the vehicle while attempting to avoid a collision with a "phantom vehicle" that cut him off. The Consumer provided the Board with photographs which showed no contact between the two vehicles, and that the right front ball joint stud was broken at the threads and the control arm ball joint port was fractured. The Consumer also provided a National Highway Transportation Safety Association (NHTSA) campaign statement, indicating that a fracture of the ball joint stud would result if the lower ball joints were not tightened to specifications when attached to the lower control arms, which could increase the risk of a crash. In addition, the Consumer presented a repair order that indicated a recall was performed involving a torque inspection of the lower ball joint attaching nuts. The Manufacturer presented no testimony concerning what work, if any, was performed for the recall. The Board concluded that nothing under Chapter 681, Florida Statutes, divested the Board of jurisdiction to consider a Consumer's claim simply because the vehicle was involved in an accident; instead, a determination as to whether a claimed defect constituted a nonconformity under the statute would, in certain instances, require the Board to determine whether the defect was the result of an accident. The Board held that the fracture of the front suspension lower ball joint stud constituted a nonconformity within the meaning of the statute because it was a defect or condition that substantially impaired the safety of the vehicle. The Manufacturer's argument that the defect was the result of an accident was rejected as unsupported by the greater weight of the evidence.

REFUND §681.104(2)(a)(b), F.S.:

Net Trade-in Allowance §681.102(19), F.S.

Campbell v. Mercedes-Benz USA, Inc., 2001-0511/TPA (Fla. NMVAB July 27, 2001).

The Consumer did not agree with the amount of the trade-in allowance reflected in her lease agreement, and requested that the Board utilize the retail price of \$14,900.00 as reflected in the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in. At the time she entered into the lease, she was given a trade-in allowance of \$7,000.00, from which her down payment of \$1,562.77 was deducted and the balance remaining was paid to her in cash by the dealer and was not applied to the lease transaction. The Manufacturer objected to awarding the Consumer the amount of the NADA Guide retail value, because the amount paid to the Consumer by the dealer for the trade-in vehicle at the time of the lease transaction reflected a "separate deal." The Manufacturer argued that the selling dealer purchased the Consumer's trade-in vehicle for \$7,000.00 in cash as an "accommodation," rather than as a trade-in toward the lease of the new vehicle. The Board declined to award the Consumer the retail price as reflected in the NADA Guide, because the lease transaction was a separate transaction from the dealer's purchase of the Consumer's trade-in vehicle,

for which the Consumer received a cash payment from the dealer.

Taylor v. Mitsubishi Motor Sales of America, Inc., 2001-0785/TPA

(Fla. NMVAB September 24, 2001).

The net trade-in allowance as reflected on the purchase agreement and Simple Interest Retail Installment Contract was not acceptable to the Consumer. The Consumer presented the Board with a copy of a "Consumer Edition" of the NADA Used Car Guide. The Manufacturer argued that the Board was constrained by the Lemon Law statute to utilize the NADA Official Used Car Guide (Southeastern Edition), which the Manufacturer presented to show that the Consumer's vehicle was not listed because of the vehicle's age. The Board concluded that it had no statutory authority to require the Manufacturer to produce alternate NADA used car guides at the hearing, nor did it have the authority to look to alternate NADA guides. The Board further concluded that, in the absence of the trade-in vehicle being listed in the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, the Board was required to resort to the purchase agreement and the Simple Interest Retail Installment Contract to determine the net trade-in allowance.